No. 79-1252

In the Supreme Court of the United States

OCTOBER TERM, 1980

STATE OF CALIFORNIA, *et al.*,

Petitioners,

vs.

SIERRA CLUB, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Reply Brief of Petitioners State of California, et al.

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INTRODUCTION

The respondents' reply briefs make clear that, with respect to the merits of this case, the litigants disagree on two basic issues. First, does section 10 of the Rivers and Harbors Act of 1899 apply where there is no effect on navigation or navigable capacity? Second, what kind of navigation effect, if any, is required to trigger the operation of section 10 as it applies to state water allocations adopted under state water rights laws? That is, does section 10 apply to such state water allocations, and if so to what extent?

In our opening brief, we argued, with respect to the first question, that section 10 applies only where there is an effect on navigation or navigable capacity. Cal. Br. 52-58. With respect to the second question, we asserted alternative arguments. First, we argued that section 10 does not apply to state water allocations adopted under state water rights laws. Cal. Br. 37-39. Second, we argued that, if the section does apply in this context, the Court should develop common law rules to accommodate the disparate congressional laws in the fields of navigation, reclamation and

water allocation. Cal. Br. 39-43. Under the latter approach, section 10 should apply only where there is a substantial effect on actual navigation. *Id.*

The respondents argue, with respect to the first issue, that section 10 applies whenever there is an effect on the "condition" of navigable waters within the meaning of the third clause of the section, without regard to whether there is an effect on "navigable capacity" within the meaning of the first clause. U.S. Br. 27-29; Sierra Br. 74-75.[1] With respect to the second question, the respondents argue that the Court should interpret section 10 as literally applicable to state water allocations adopted under state water rights laws, and should not develop any common law rules governing its meaning in this context. U.S. Br. 34-43; Sierra Br. 74-75.

In short, we argue that section 10, as applied to state water allocations, applies only where there is a substantial effect on federal navigation interests. The respondents argue that the section applies in this context even where there is no effect whatsoever on federal navigation interests.

As we explain below, the respondents' argument is inconsistent with the congressional intent underlying the 1899 Act, for Congress never contemplated that the Act would apply to state water allocations that have no navigational effects. Moreover, their argument would effectively allow the Corps to intrude into local water matters that have been within the historic province of the states. Finally, and perhaps most importantly, the respondents' argument was specifically rejected by this Court in *United States v. Rio Grande Dam & Irrig. Co.*, 174 U.S. 690 (1899).

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1. The United States comments, however, that the third clause may apply only to alterations or modifications that have a "potential for affecting navigation." U.S. Br. 31. This representation is inconsistent with proposed regulations of the Corps of Engineers that would apply to any structure that affects the "physical capacity," rather than "navigable capacity," of navigable waters. See U.S. Br. 31 n. 20. This representation is also inconsistent with the decision of the Court of Appeals, which holds that the third clause applies to structures that may have no effect on navigation or navigable capacity. See Cal. Pet. App. 24-27. To the extent that the United States concedes that the third clause applies only where there is an effect on navigation or navigable capacity, its views are consistent with our own.

I. The Rivers and Harbors Act of 1899 Does Not Apply to State Water Allocations Adopted Under State Water Rights Laws, at Least in the Absence of an Effect on Actual Federal Navigation Interests.

We turn initially to the second question, *i.e.* whether, and to what extent, the Rivers and Harbors Act of 1899 applies to state water allocations.

A. THE RESPONDENTS' LITERAL ARGUMENT.

The respondents' main argument is that the 1899 Act *literally* applies in this case, and makes no exception for water allocations adopted under state water rights laws. U.S. Br. 33-34, 41; Sierra Br. 74. Significantly, the respondents do not argue that the Act or its legislative history reveal a purposeful congressional intent to authorize the Corps to control the water allocation systems of the western states.[2] They argue instead that the Act and its legislative history reveal no explicit congressional intent *not* to authorize the Corps to exercise jurisdiction over such systems, and thus

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2. The Sierra Club argues that the congressional debates relating to the 1899 Act reveal that Congress meant to apply the Act to *all* structures or activities that might affect navigable waters, including structures or activities undertaken or authorized by the states. Sierra Br. 87-90. The Act was amended to apply to any obstruction "affirmatively authorized by Congress," it is stated, for the very purpose of ensuring that state-approved obstructions are not beyond the scope of the Act. *Id.* As we have noted, however, these congressional debates show only that the Act was intended to apply to state-approved structures, such as "bridges," that are unrelated to the water supply systems established by the western states. Cal. Pet. 23 n. 12; Cal. Br. 18 n. 9. The debates reveal no specific congressional intent to apply the Act to the western states' water supply systems, or to substantially diminish the states' authority to control such systems.

The Sierra Club also argues that the legislative history of the 1899 Act reveals that Congress meant to delegate authority to the Corps to determine whether a structure or activity constitutes an "obstruction" of navigation, rather than have this question determined by the courts. Sierra Br. 76-78. This legislative history shows only that Congress authorized the Corps rather than the courts to determine whether an obstruction is "reasonable," and thus should be legitimized even though it falls within the scope of the general prohibition. See 21 Cong. Rec. 8602 (Reps. Carlisle, Hoar), 8604 (Rep. Gray), 8690 (Rep. Carlisle). See Cal. Br. 57.

that Congress inferentially meant for the Corps to exercise such jurisdiction.

The respondents' literal argument shows no more than that Congress, in passing the 1899 Act, did not specifically address the Act's effect on the congressionally-delegated authority of the western states to allocate water for reclamation purposes. Congress, in passing the 1899 Act, was thus silent on the issue in this case. It cannot be presumed that, because Congress was silent, it meant to substantially abridge the authority which it had previously delegated to the western states to control their water supply systems. Indeed, Congress enacted several laws, both before and after the 1899 Act, that established an historic tradition of deferring to state laws on the subject of water allocation and reclamation. These congressional enactments provide no indication that the states' authority thereunder is subject to the Corps' powers under the 1899 Act. It is thus more significant that Congress has never expressly subjected the states' congressionally-delegated powers to the Corps' authority under the 1899 Act, than that Congress remained silent on the subject in the 1899 Act itself.

In any event, it should not be presumed that Congress intends to depart from its historic policy of deferring to state water rights laws unless it speaks with a clear voice. Since Congress did not speak with a clear voice in the 1899 Act, it cannot be presumed that Congress meant to authorize the Corps to assume jurisdiction over the states' water supply systems. Thus, the more likely inference to be drawn from the congressional silence is that Congress intended no substantial departure from its historic policy of deferring to the states' right to control their own water supply systems.

From the foregoing, it is apparent that Congress, in enacting laws on the subjects of navigation, reclamation and water allocation, has never specifically addressed the potential conflict between these laws, as this conflict arises here. Therefore, no statutory language provides a definitive test for resolving the landmark issue presented in this case. As this Court has held on several occasions, however, the federal courts have often developed com-

mon law rules to fill in the interstices of a congressional regulatory scheme. As this Court recently commented in developing federal common laws relating to water pollution:

> "[W]here there is an overriding federal interest in the need for a uniform rule of decision or *where the controversy touches basic interests of federalism,* we have fashioned federal common law." *Illinois v. City of Milwaukee,* 406 U.S. 91, 105 n. 6 (1972). (Emphasis added.) Accord, *Textile Workers v. Lincoln Mills,* 353 U.S. 448, 456-457 (1957); *Banco Nacional de Cuba v. Sabbatino,* 376 U.S. 398, 421-427 (1964); *Hinderlider v. La Plata Co.,* 304 U.S. 92, 110 (1938).

Since this case "touches basic interests of federalism" concerning the interrelationship between federal and state power in the fields of navigation, reclamation and water allocation, the Court should develop federal common law rules to the extent necessary to achieve Congress' broad goals in these fields.

These congressional goals can also be achieved by more conventional methods of statutory analysis. In *United States v. Rio Grande Dam & Irrig. Co.,* 174 U.S. 690 (1899), this Court held that Congress, in delegating authority to the western states to control water allocations under their water rights laws, did not authorize the states to "destroy" or substantially impair the navigability of navigable waters. See Cal. Br. 42 n. 23. Thus, the Court developed a common law rule that limits the states' rights to allocate water for reclamation purposes in instances where important federal navigation interests are at stake.[3] This common law rule results in a balancing of federal and state powers in the fields of navigation, reclamation and water allocation. In light of this common law rule, federal navigation inter-

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3. The common law rule developed in *Rio Grande* effectively limits this Court's holding in *Willamette Iron Bridge v. Hatch,* 125 U.S. 1 (1888), in which the Court held that the federal common law does not bar obstructions in navigable waters where the interests of other states are not affected. Under *Rio Grande,* the federal common law bars the states from "destroying" navigability in the process of reclaiming their arid lands.

ests are protected even if the 1899 Act is held not to apply to water allocations adopted under state water rights laws.

If, on the other hand, the 1899 Act is held applicable to state water allocations, the Act can still be interpreted in a way that accommodates congressional laws on the subjects of navigation and reclamation. Section 10 of the Act, which prohibits obstructions to "navigable capacity," can be construed, in the context of state water allocations, to apply only to obstructions that *substantially* affect the "capacity" of the waters to support *actual* navigation in the area *where commerce actually takes place.* Thus, the Court could adopt a "rule of reason" test rather than a "per se" test in defining the scope of section 10, as it applies to water supply systems adopted under state water rights laws.

Indeed, this Court, in *United States v. Rio Grande Dam & Irrig. Co., supra,* appeared to adopt such a "rule of reason" test in determining the scope of section 10. The Court stated:

> "The question always is one of fact, whether such appropriation *substantially* interferes with the navigable capacity within the limits *where navigation is a recognized fact.*" 174 U.S. at 709. (Emphasis added.)

Under this test, section 10 does not apply to *every* obstruction that affects navigable capacity. Instead, it applies only to obstructions that *substantially* affect navigable capacity in the area *where commerce is actually carried out,* which inferentially requires consideration of the impact on actual navigation. Thus, this Court in *Rio Grande* rejected the very literal argument that is asserted by the respondents in this case. Instead, the Court developed a common law rule, in the form of a "rule of reason" test, to carry out Congress' goals under the 1899 Act.[4]

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4. This Court has also developed a common law rule with respect to the U.S. Attorney General's enforcement powers under the 1899 Act. In *United States v. Republic Steel Corp.,* 362 U.S. 482, 491-492 (1960), the Court held that the Attorney General has inherent power to enjoin non-structural obstructions under the Act even though the Act does not expressly authorize him to enjoin such obstructions.

This Court appears to have applied the "rule of reason" test in subsequent cases involving an interpretation of the Corps' powers under the 1899 Act. In *Sanitary District v. United States,* 266 U.S. 405 (1925), and *Wisconsin v. Illinois,* 278 U.S. 367 (1929), the Court held the Act applicable to water diversions that reduced shipping capacity in the Great Lakes by more than 3 million tons annually, thus impairing commerce among several states bordering on the Great Lakes. See 266 U.S. at 423, 426; 278 U.S. at 407-409. In *United States v. Republic Steel Corp.,* 362 U.S. 482 (1960), the Court held the Act applicable to industrial waste deposits that decreased the 21-feet draft of a navigable waterway by 4-9 feet, thus preventing many vessels from actually using the waterway. 362 U.S. at 483. Thus, the Court has never applied the Act without reference to the effect of the structure or activity on actual navigation. *A fortiori,* the Court should not do so with respect to water diversions that allocate water among competing users under state water rights laws, since Congress has delegated authority to the states over this subject matter.

The water diversions in this case do not fall within the scope of section 10 under the "rule of reason" test developed in the *Rio Grande* case. The diversions substantially affect navigable capacity in areas where commerce is *not* actually carried out, since they reduce Delta water levels by 1½ feet near Clifton Court Forebay. Cal. Br. 9 n.5. The diversions do *not,* however, substantially affect the capacity of the Delta's waters to support navigation, either actual or hypothetical, in areas where commerce *is* actually carried out; they reduce Delta water levels by only about an inch in the San Joaquin River, where the flow of commerce in the Delta actually occurs. *Id.* The effect of this reduction on actual navigation and commerce is particularly insignificant since the tide alone causes Delta water levels to vary by 3-3½ feet per day. *Id.* In short, the diversions do not substantially affect the capacity of Delta waters to support either actual

or hypothetical navigation in areas where commerce is actually carried out.[5]

The approaches suggested above provide a method for resolving the potential conflict between congressional laws relating to navigation and reclamation in a way that serves the basic aims of both laws. This Court has often held that, if possible, potential conflicts between statutes should be resolved in a way that affords meaning to both statutes. As this Court stated in *United States v. Borden,* 308 U.S. 188, 198 (1939):

> "When there are two acts upon the same subject, the rule is to give effect to both if possible . . . The intention of the legislature to repeal 'must be clear and manifest . . .' There must be a positive repugnancy between the provisions of the new law, and those of the old. . . ."

Our alternative arguments provide a basis for accommodating both national and local goals in the areas of navigation and reclamation.[6]

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5. The Court of Appeals, in ruling that it is irrelevant whether the diversions affect navigable capacity, Cal. Pet. App. 24-27, did not apply the "rule of reason" test formulated in the *Rio Grande* decision. The district court properly invoked the "rule of reason" test, but improperly applied it. According to the district court, the diversions substantially reduce Delta water levels by 1½ feet "in the vicinity of Clifton Court Ferry." Cal. Pet. Supp. App. 31-32. However, this area is near Clifton Court Forebay, which is several miles from interior Delta channels where commerce is actually carried out. The district court's confusion on this issue is reflected in its comments that "water levels *in the San Joaquin River* could be lowered by as much as 1½ feet at low tide," *id.* at 28, even after the court noted that the lowering actually took place at Clifton Court Ferry which, as noted, is a considerable distance from the San Joaquin River itself, *id.* at 28 n. 27. (Emphasis added.) In short, the district court held that the diversions substantially affect navigable capacity in areas where commerce is *not* actually carried out.

If, as suggested above, the Court holds that the water diversions in this case are beyond the scope of section 10 because they do not affect "navigable capacity" under a "rule of reason" test, the Court of Appeals' ruling —in holding that section 10 applies without regard to whether navigable capacity is affected—is material to the outcome of this case. Under that result, the lower court's ruling would not be dictum, notwithstanding our earlier characterization to the contrary. See Cal. Br. 53.

6. The United States argues that our position is undermined by Kinney's treatise on water rights. See 1 Kinney, *Irrigation and Water Rights*

B. PUBLIC POLICY.

In our opening brief, we argued that our views enable the western states and the Corps to exercise their historic functions, and thus result in sound public policy. Cal. Br. 44-48. If the 1899 Act fully applies to state water allocations adopted under state water rights laws, the Act would apply to virtually every reclamation scheme adopted by the western states. *Id.* Under this result, the Corps would have veto power over virtually every water right granted by the western states, even where there may be no significant impact on federal navigation interests. *Id.* The Corps would thus be ultimately responsible for allocating water among competing economic and environmental interests. *Id.* This is a function that has been historically exercised by the states, not the Corps. *Id.*

The respondents do not oppose our argument that their views would sanction a pervasive intrusion by the Corps into water allocation systems adopted under state water rights laws. Instead, they attempt to justify the intrusion. According to the United States, "the policy of deferring to state law respecting water rights where consistent with federal law can be accomodated in the permitting process" by the Corps. U.S. Br. 42.[7] The United States

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(2d ed. 1912); U.S. Br. 39 n.26. Although Kinney followed the literal approach urged by the respondents here, he did not consider our argument that Congress' laws on the subject of navigation and reclamation can be accommodated by the development of common law rules. Moreover, Kinney recognized the force of the policy factors which underlie our argument that the Court should develop such common law rules, stating:

> "In the Western portion of this country the navigable streams are few, and the navigation not very extensive on them. In many portions the agricultural interests are far more important than navigation. . . . Where is this conflict [between navigation and agricultural interests] to end? Is the inferior navigation of these few and small streams to give way to the march of progress, resulting in the settling up of these vast tracts, and the cultivation of more land, requiring more water to properly cultivate? Or is navigation, like the dog in the manger, to stop all this progress, and remain of paramount right as the law of today?" 1 Kinney, *supra* at 591.

These policy factors are served if this Court adopts our approach rather than the literal approach urged by the respondents.

7. A similar argument is made in the amicus brief submitting by the National Wildlife Federation (NWF), in which it is argued that our argument "confuses the jurisdictional question of whether a Corps permit must

suggests that the Corps can issue a "general permit" relating to water allocations authorized under state water rights laws. *Id.* In short, the United States, although conceding the existence of an historic "policy of deferring to state law respecting water rights," argues that this policy can be accomodated by the Corps in the administrative process.

If the Corps has the option of accommodating the historic congressional policy of deferring to state water rights laws, it also has the option of *not* accommodating this policy. Thus, under the respondents' views, there is no assurance that this historic congressional policy will be accommodated within the framework of the 1899 Act. Nothing in the Act, or its legislative history or surrounding historical circumstances, suggests that Congress meant to entrust the Corps with the option of achieving this historic congressional policy. The policy was established by Congress itself, and is not the product of the Corps' administrative largess. Although Congress has never precisely defined the exact interrelationship between federal and state powers in the fields of navigation and reclamation, it never contemplated that this interrelationship would be worked out by the Corps under the 1899 Act.

Indeed, the Corps' own regulations belie the suggestion that the Corps can or will work out a proper interrelationship between federal and state powers in these fields. As noted in our opening brief, the Corps' regulations authorize the denial of a permit on any grounds relating to the "public interest," which the regulations define as involving *inter alia* "food production," "water supply," "economics," "aesthetics," "general environmental concerns," "land use," and "in general, the needs and welfare of the people." Cal. Br. 46. Thus, the Corps has expressly authorized

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be sought with the substantive question of whether a permit should be issued." NWF Br. 25. In short, it is argued that the Corps has jurisdiction over *all* matters that affect navigable waters, and that the Corps—in exercising its jurisdiction—should balance federal navigation and environmental interests against state and local interests in providing a water supply for irrigation and other local uses. *Id.*

itself to inquire into the very factors that the western states examine in determining whether to allocate water for local irrigation, domestic and other uses.

Under the Corps' regulations, for example, the Corps could determine the allocation of water among competing agricultural interests, or between competing agricultural and urban interests, or between competing economic and environmental interests. It could determine, for example, that it is better for Los Angeles to achieve more urban growth than for California's Central Valley to produce more food, or it could determine just the opposite. Moreover, under the respondents' argument, the Corps could make these determinations even though the allocation of water among these competing interests has no demonstrable effect on NWF Br. 27 n.24, the Corps must have authority to consider purely local matters involving "water supply," "food production," "land use," and other such matters, even where there is no demonstrable effect on federal navigation interests. NWF's effort to justify the Corps' intrusion into such local matters belies its argument that the Corps' powers must be interpreted broadly in order to protect federal interests from state interference.

In our opening brief, we asserted alternative arguments that protect national concerns relating to navigation as well as local concerns relating to the development of a water supply for the arid West. Cal. Br. 37-43. Although our argument protects the national concerns that are the focal point of the respondents' briefs, the respondents' argument does not protect the state and local concerns that are the subject of Congress' laws delegating actual federal navigation interests. It is submitted that Congress never intended for the Corps to have such broad control of the economic life and destiny of the western states.

NWF asserts in its amicus brief that Congress, in enacting the 1899 Act, determined that "centralized control and protection of the navigable waterways was properly a federal concern," and thus that Congress entrusted the Corps with authority to carry out this "federal concern." NWF Br. 19, 21-22. If this is so, it is difficult to understand why, as NWF argues later in its brief, see

authority to the states to control their own water supply. Instead, the respondents urge that this Court defer to the administrative judgment of the Corps on this subject, even though the Corps has never historically exercised this function and has no particular expertise on the subject. We submit that our alternative arguments, unlike the respondents' literal argument, provide the accommodation of both national and local concerns that underlie Congress' laws on the subjects of navigation, reclamation and water allocation.[8]

C. CONGRESSIONAL DELEGATION OF AUTHORITY TO THE STATES.

The respondents argue that Congress, in delegating authority to the states to control their water supply systems, did not delegate authority to interfere with substantial federal navigation interests. U.S. Br. 34-38.[9] We do not contend otherwise. We have consistently agreed that Congress, although delegating authority to the states, retains the power under the navigation servitude to ensure

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8. The Sierra Club also argues that, under our second alternative argument, "the question which determines the Corps' jurisdiction is . . . precisely the same . . . as the ultimate question which the Corps is called on to decide when it reviews a permit application on the merits." Sierra Br. 74. This argument mischaracterizes our position. Under our second alternative argument, we argued that the 1899 Act should not be deemed to apply to structures that *substantially* affect actual navigation. Cal. Br. 39. On the other hand, this Court has held that, with respect to structures regulated under the Act, the Corps can approve structures that do not "unreasonably" obstruct navigable capacity. See *Wisconsin v. Illinois*, 278 U.S. 367, 413 (1929). A structure that *substantially* affects actual navigable capacity is not necessarily *unreasonable*. Under our argument, the Corps would thus have discretion to approve or disapprove any structure that substantially affects actual navigable capacity. Sierra Club's assertion that our argument would prevent the Corps from disapproving any structure that falls within its jurisdiction is thus without merit.

9. Specifically, the United States argues that the states' authority under pre-1899 legislation dealing with desert lands and mining is " 'limited by the superior power of the General Government to secure the uninterrupted navigability of all navigable streams within the United States,' " citing the *Rio Grande* decision. U.S. Br. 35. The United States also argues that the rights-of-way acts of 1891 and 1897 did not convey "the right to alter navigable waters in ways that might reduce their navigability." U.S. Br. 36.

the continued navigability of navigable waters. Cal. Br. 25-26. Also, as noted above, this Court held in the *Rio Grande* case that Congress, in delegating authority to the states, did not authorize the states to "destroy" navigability. *United States v. Rio Grande Dam & Irrig. Co.*, 174 U.S. 690, 709 (1899). In short, Congress has constitutional power to protect navigation, and in any event did not authorize the states to destroy navigation. There is no dispute between the litigants on this issue.

In our opening brief, we argued that Congress, in enacting section 8 of the Reclamation Act of 1902, reaffirmed the historic policy of deferring to state water rights laws in the specific context of reclamation. Cal. Br. 28-31. The United States argues that "nothing in the statutory language of section 8 requires or implies that the section was to operate as a limitation on the construction of the 1899 Act." U.S. Br. 37. It is more significant, in our view, that Congress provided no indication in the 1902 Act that the states' broad authority thereunder was subject to the Corps' broad powers under the 1899 Act. If Congress had intended to thus substantially diminish the broad authority conferred on the states under the 1902 Act, it would surely have spoken with reasonable clarity. Congress' failure to address the question in the 1902 Act is an indication that no such diminution was intended.

The United States notes that the states' authority under section 8 of the Reclamation Act of 1902 is limited by the acreage limitation contained in section 5 of the same Act, 32 Stat. 389 (1902), 43 U.S.C. § 431 (1970 ed.), citing this Court's decision in *Ivanhoe Irrig. Dist. v. McCracken*, 357 U.S. 275 (1958). U.S. Br. 38. The United States apparently argues by way of analogy that, since the states' authority under the 1902 Act is limited by the acreage limitation, it is also limited by the Corps' powers under the 1899 Act. The legislative history of the 1902 Act, however, reveals that the acreage limitation was an essential feature of the Act, one that this Court later described as imposing a "specific and mandatory" obligation on federal officials. *Ivanhoe Irrig. Dist. v. McCracken*, *supra* at 291. The analogy asserted by the United States breaks

down because the legislative history of the 1902 Act provides no similar indication that the states' powers thereunder are limited by the Corps' powers under the 1899 Act. Indeed, no reference was made to the 1899 Act in the congressional debates relating to the 1902 Act. The significance of *Ivanhoe,* in our view, is that it provides another example of this Courts' approach in viewing the reclamation laws in their entirety, and in rejecting the notion that one statute should be literally applied without reference to other congressional policies and objectives.[10]

The respondents also argue that we are seeking a disfavored "implicit partial repeal" of the 1899 Act, in that we argue that post-1899 legislation alters the effect of the 1899 Act as it applies here. U.S. Br. 36. This argument mischaracterizes our position. We do not argue that post-1899 legislation implicitly repeals the 1899 Act as applied in the instant context. Instead, we argue that the 1899 Act was never never intended to apply in this context in the first place. Cal. Br. 16-19, 22-26. Under our argument, Congress delegated authority to the western states to control their water supply systems *before* the 1899 Act was passed, principally by legislation relating to desert lands and mining. Cal. Br. 22-26. The post-1899 legislation, particularly that specifically relating to reclamation, reaffirms the states' authority to control their water supply systems, and thus reinforces the view that the 1899 Act was never intended to apply in this context. Cal. Br. 26-36. Indeed, the respondents, by arguing that the 1899 Act alters the effect of earlier statutes delegating authority to the states to control their water supply systems, effectively argue that the 1899 Act implicitly repeals or limits the earlier statutes. Thus, we do not ask the Court "to do the work of Congress," as asserted by the respond-

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10. The United States also states that section 8 is "no barrier to the federal government's exercise of eminent domain powers to acquire water rights" for the federal reclamation projects, citing this Court's decision in *City of Fresno v. California,* 372 U.S. 627 (1963). U.S. Br. 38. The United States overlooks the fact that this Court recently disavowed the dictum in the *City of Fresno* decision on which the United States relies. See *California v. United States,* 438 U.S. 645, 672 n. 24 (1978).

ents. See U.S. Br. 41. Instead, the respondents ask this Court to undo that which Congress has already done.[11]

II. The Rivers and Harbors Act of 1899 Does Not Apply to Structures or Activities That Have No Effect on Navigable Capacity.

To this point, we have argued, first, that section 10 of the 1899 Act does not apply to state water allocations. As an alternative argument, we have argued that, if section 10 applies in this context, the Court should develop common law rules, in the form of a "rule of reason" test, with respect to its meaning. Under the latter approach, the Court should construe the phrase "navigable capacity" in section 10, as denoting only a substantial interference with the capacity of waters to support actual navigation in the area where commerce is actually carried out. Our alternative argument thus hinges on the assumption that section 10 applies only where there is an effect on "navigable capacity" as that phrase is used in the section.

In support of this assumption, we argued in our opening brief that the first clause of section 10 establishes a general prohibition against obstructions to "navigable capacity" within the meaning of the first clause; the other clauses of section 10, as well as section 9, qualify the general prohibition by authorizing the Corps to approve certain such obstructions if they do not "unreasonably" obstruct navigable capacity. Cal. Br. 51-58. The respondents, on the other hand, argue that the third clause of section 10 prohibits any structure or activity that affects the "condition" of navigable waters without Corps approval, even though there may be no effect on "navigable capacity" within the meaning of the first

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11. The United States also asserts that our argument is inconsistent with this Court's decision in *Sanitary District v. United States*, 266 U.S. 405 (1925). U.S. Br. 39. That case involved substantial diversions by the State of Illinois from Lake Michigan for sewage disposal purposes, and the diversions substantially impaired existing commerce on Lake Michigan. That decision is inapposite here for several reasons. First, Congress has delegated unique authority to the western states to control their water supply systems in recognition of the fact that the arid West suffers from unique water supply problems. Cal. Br. 20-22. Specifically, the Reclama-

clause; the Corps can authorize the obstruction, however, only if it does not "unreasonably" obstruct navigable capacity. U.S. Br. 27-29.

We thus argue that the first clause establishes the Corps' general jurisdiction under the Act, and thus that the Corps' jurisdiction is limited to structures or activities that affect "navigable capacity." The respondents argue that the third clause establishes the Corps' jurisdiction under the Act, and thus that the Corps has jurisdiction over any structure or activity that affects the "condition" of navigable waters, even though there is no effect on "navigable capacity." In short, we argue that the Corps has jurisdiction only where there is an effect on federal navigation interests, and the respondents argue that the section applies even where there is no such effect. If our interpretation is correct, the Court can develop a common law rule, or "rule of reason" test, with respect to the meaning of the phrase "navigable capacity" in section 10. If the respondents' interpretation is correct, the Court apparently cannot develop such a rule, since it is irrelevant whether there is an effect on navigable capacity at all.

The respondents' view would effectively deprive section 10 of part of its meaning and significance, and would render the section

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tion Act of 1902 applies only to 16 western states. See 32 Stat. 388 (1902). The Desert Land Act of 1877 applies only to 3 western states and 8 western territories. See 19 Stat. 377 (1877). The Flood Control Act of 1944 applies only to states "lying wholly or partly west of the ninety-eighth meridian . . . ." 58 Stat. 887, 889 (1944). Illinois, as a non-western state, is not a beneficiary of these statutes. Thus, Congress has dealt specially with the West because of its unique water supply problems, and its scheme was not involved in the *Sanitary District* case.

Second, in *Sanitary District,* Illinois did not make the diversions for the purpose of allocating water among competing users, and the diversions were not authorized under Illinois' water rights laws in any event. As we have noted, the authority delegated by Congress to the western states was for the purpose of enabling the states to allocate their water supply among competing users, and—since Illinois' diversions were related to sewage disposal rather than water supply—this congressional purpose was not involved in the *Sanitary District* case.

Third, as explained in our opening brief, the water diversions in *Sanitary District* substantially interfered with actual commerce, unlike the diversions here. Cal. Br. 43 n. 25. Moreover, the diversions in *Sanitary District* interfered with the rights of other states in interstate waters, unlike the diversions here. *Id.*

internally inconsistent. As we explained in our opening brief, the evident purpose of the various clauses in section 10 is to differentiate between various kinds of structures and activities that can be approved by the Corps. Cal. Br. 53. Specifically, section 9 authorizes the Corps to approve a "bridge, dam, dike, or causeway . . . ." The second clause of section 10 authorizes the Corps to approve a "wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures . . . ." The third clause authorizes the Corps to approve any attempt to "excavate or fill, or in any manner to alter or modify," the "condition" or "capacity" of the waters. Thus, each clause describes a different kind of structure or activity that is subject to Corps approval. The third clause, unlike the other clauses, merely authorizes the Corps to approve certain types of *non-structural activities,* principally excavations or fills. *Id.*

Under the respondents' argument, however, the third clause is not limited to a particular kind of activity. Instead, it authorizes the Corps to exercise jurisdiction over *all* structures or activities that affect the "condition" of navigable waters, even though the structure or activity might also fall within the ambit of another clause. Under this view, the third clause would thus apply to structures and activities that are expressly dealt with elsewhere in the section. For example, a wharf—which is specifically governed by the second clause—could also be governed under the third clause. The Corps, acting under its broad powers in the third clause, could thus prohibit the construction of a wharf on the basis of criteria different from that found in the second clause. Under the respondents' view, section 10 would establish different criteria for the same structure or activity. The section would thus be internally inconsistent. Accordingly, it is clear that Congress meant for each clause to apply to a different kind of structure or activity, rather than for the third clause to authorize the Corps to veto *all* structures or activities regardless of their effect on navigable capacity.[12]

12. In *United States v. Republic Steel Corp.*, 362 U.S. 482 (1960), this Court appeared to similarly interpret the third clause as applicable only to non-structural activities, rather than a basis for Corps control of all struc-

Our interpretation was upheld by this Court in *Wisconsin v. Illinois,* 278 U.S. 367 (1929). There, an action was brought against the State of Illinois by various states on grounds that Illinois was violating the general prohibition contained in the first clause of section 10. The Court rejected the action on grounds that, although the activity in question might be prohibited under the first clause, it had been approved by the Corps under its authority in other clauses. The Court thus indicated, as we argue, that the Corps has power under the second and third clauses to legitimize activities that are otherwise prohibited by the the first clause. Indeed, the Court stated:

> "*The Supreme Court of Maine in Maine Water Co. v. Knickerbocker Steam Towage Co., 99 Me. 473, took the same general view in construction of the same section.* It held that the broad words of the first clause of that section were not intended to limit the second and third clauses[13] and that *Congress' purpose was a direct prohibition of what was forbidden by them except when affirmatively approved by the Chief of Engineers and the Secretary of War.* We concur in this view." 278 U.S. at 413. (Emphasis added.)

The Court's statement—that "Congress' purpose was a direct prohibition of what was forbidden by them except when affirmatively approved by" the Corps—supports our view that the Corps has authority to approve that which the Act otherwise prohibits, and is inconsistent with the respondents' view that the Corps can only approve that which is *not* otherwise prohibited by the Act. Our interpretation is reinforced by the *Wisconsin* decision's adoption of the reasoning provided by the Maine Supreme Court in

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tures or activities that might fall within the ambit of other clauses. The Court, describing the effect of the third clause, stated:

> "Nor may *excavations or fills,* described in the third clause, that alter or modify 'the course, location, condition, or capacity of' a navigable river be made unless 'the work' has been approved by the Secretary of the Army." *Id.* at 486. (Emphasis added.)

13. In context, the Court apparently meant that "the broad words of the first clause of that section were not intended to limit [the Corps' powers to authorize obstructions under] the second and third clauses." In short, even though an obstruction is prohibited under the first clause, it can be authorized by the Corps under the second or third clauses.

Maine Water Co. v. Knickerbocker Steam Towage Co., 99 Me. 473, 59 Atl. 953 (1905), in which the various clauses of section 10 were held to be "qualifications" of the general prohibition contained in the first clause. Cal. Br. 55.[14] The *Wisconsin* decision thus upholds our interpretation of section 10, and rejects that of the respondents.[15]

Ironically, the respondents' interpretation of the Corps' powers under the third clause strengthens our argument that the Court should accommodate federal and state powers in construing section 10 in this case. As noted in our opening brief, the broader the Corps' regulatory authority under the Act, the greater the potential conflict with other congressional laws delegating authority to the states to control their water supply systems; the greater the potential conflict, the less likely that Congress meant for the Corps to intrude on the powers delegated to the states. Cal. Br. 46-47. If, as the respondents argue, the Corps has authority under the third clause over structures or activities that have no navigational effects, the Corps would have veto power over state water rights systems and state reclamation activities, even where there is no perceptible impact on federal navigation interests. Congress surely did not contemplate such a pervasive federal intrusion into

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14. In the *Knickerbocker Steam Towage* case, the Maine Supreme Court stated:

> "[W]e think that the *general prohibition* [in the first clause] is likewise *qualified* by the sentences which follow . . . . [T]he legislative intention was that the *general prohibition* [in the first clause] was to be regarded as subject to specified *qualifications*. When the language [of the first clause] . . . is followed with [the language of the second clause] . . ., the implication seems clear to us that such structures, if built according to plans recommended and authorized as provided in the section, are authorized by Congress . . . and that they are lawful without any further action by Congress." 59 Atl. at 957. (Emphasis added.)

15. The United States argues that its views are supported by a lecture delivered by a Corps official in 1926, more than a quarter-century after passage of the 1899 Act. U.S. Br. 28-29. Even assuming that the lecture is relevant and probative, it is inconsistent with the above-described analysis in the *Wisconsin* decision.

an area traditionally regulated by the states, even in the absence of a distinct federal interest.[16]

CONCLUSION

The fundamental issue in this case is whether the Army Corps of Engineers has authority, under the River and Harbors Act of 1899, to override state water rights systems even where there is no effect on federal navigation interests. The respondents, in arguing that the Corps has such authority, would have the Corps function as a super water agency, one that is ultimately responsible for controlling the allocation of water among competing economic and environmental interests in the West. In enacting the 1899 Act, Congress never contemplated that the Corps would thus occupy a role that has been historically assumed by the states. We argue that this Court should at least develop a common law, or "rule of reason" test, in defining the meaning of section 10, as this Court did in *United States v. Rio Grande Dam & Irrig. Co., supra.* This approach, we believe, results in a proper balancing of federal and state interests which Congress has consistently followed in this area.

Respectfully submitted,

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16. The Sierra Club contends that this petition presents "no question" concerning the Peripheral Canal. See Sierra Br. 3. In our view, the appeal of the district court's decision raised such a question, and in any event we raised such a question in our petition for writ of certiorari. See Cal. Pet. 5-6. The Corps' jurisdiction over water diversions made by the canal depends, in our view, on the same test which this Court adopts with respect to the Corps' jurisdiction over water diversions made by the State pumping plants.